

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 15, 2015

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2013AP2594

Cir. Ct. No. 2012CV158

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

JAMES C. LIMBERG,

PLAINTIFF-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

**COUNTY OF JACKSON, AS EMPLOYER, AND COUNTY OF JACKSON, AS
SELF-INSURER,**

DEFENDANTS-CO-APPELLANTS.

APPEAL from a judgment of the circuit court for Jackson County:
THOMAS E. LISTER, Judge. *Reversed.*

Before Kloppenburg, P.J., Lundsten and Blanchard, JJ.

¶1 PER CURIAM. The Labor and Industry Review Commission and the County of Jackson appeal from a judgment of the circuit court reversing the Commission's order that denied worker compensation benefits to James Limberg. We conclude that substantial and credible evidence supports the Commission's decision. We therefore reverse the circuit court's judgment.

¶2 Limberg was rear-ended by a truck while plowing snow for the County of Jackson at 9:40 a.m. on January 23, 2004. Limberg was able to drive the snowplow truck back to work. He subsequently drove himself to the emergency room on the date of the accident and returned to his job and worked until 7:00 p.m. Limberg consulted with numerous treatment providers over the course of the next five years for symptoms that involved his head, neck, and left shoulder.

¶3 On September 11, 2008, Limberg applied for worker's compensation benefits. Limberg claimed compensation for disability and treatment, including a left shoulder surgery on September 19, 2006, more than two and one-half years after the accident, and a cervical fusion on July 29, 2009, more than five years after the accident. Limberg sought temporary total and permanent partial disability benefits for the neck and left shoulder. He also requested payment of medical expenses.

¶4 An evidentiary hearing was held. The medical experts reached differing opinions concerning the nature and extent of the injuries sustained on January 23, 2004. Limberg's claim was supported by three physicians, including Dr. Jay Loftsgaarden, Dr. Andrew Vo, and Dr. Thomas Perlewitz. The County filed medical reports and treatment records from Dr. William Klemme, Dr. Randal Wojciehoski, and Dr. Peter Ihle.

¶5 Regarding the left shoulder, Dr. Loftsgaarden opined that the accident caused left shoulder dysfunction. He rated two percent disability at the left shoulder, although this assessment was made before the shoulder surgery. Regarding the neck, Dr. Vo opined that the accident directly caused a neck injury and rated five percent permanent disability, although this assessment was made before the cervical fusion. Dr. Perlewitz opined that the accident caused a neck injury by aggravating a pre-existing degenerative condition beyond normal progression. Dr. Perlewitz, who performed the cervical fusion surgery, further opined that the injury necessitated the fusion and associated treatment. He rated twenty-three percent permanent disability.

¶6 Dr. Klemme performed an independent medical examination on October 4, 2010. Regarding the neck, he opined that the accident caused, at most, a soft tissue strain/sprain. Dr. Klemme determined that Limberg reached a healing plateau from the cervical strain/sprain within three months, or April 23, 2004, and rated no permanent disability for the injury. Dr. Klemme also opined that the accident caused no injury to Limberg's left shoulder. He concluded that the left shoulder surgery and the cervical fusion had no causal relationship to the accident.

¶7 Dr. Wojciehoski performed independent medical examinations on July 15, 2005, and January 13, 2009. He opined that the accident caused a soft tissue injury to the neck and back. He also opined that the accident caused no injury to the left shoulder. He determined that Limberg reached a healing plateau from the soft tissue injury by May 23, 2004, and rated no permanent disability for this injury.

¶8 Dr. Ihle performed an independent medical examination on January 10, 2006. He concluded that Limberg had a long standing degenerative

disease in his neck and that the accident caused a temporary aggravation of this degenerative underlying neck condition that resolved within two years of the accident. He also opined that the accident caused no injury to the left shoulder.

¶9 The Administrative Law Judge agreed with the adverse medical examiners that Limberg's left shoulder condition was not related to the January 23, 2004 accident. As to the cervical spine condition, the ALJ stated, "Because [Limberg's] doctors relied on inaccurate history in reaching their opinions, I am unable to credit their opinions." The ALJ stated, "On this record I agree with Dr. Klemme that [Limberg's] cervical spine condition resulting in the July 29, 2009 surgery 'modestly progressed as expected in an age-related fashion.'" The ALJ further adopted Dr. Klemme's finding that Limberg reached an end of healing as of April 23, 2004.

¶10 Limberg sought Commission review. The Commission affirmed the ALJ's determination with modifications. The Commission found that the accident resulted in no injury to Limberg's left shoulder, and that the neck injury resolved by April 23, 2004, with no residual permanent disability. The Commission agreed with the ALJ that Limberg "did have considerable preexisting degeneration as shown in the scans. He underwent significant treatment before the work injury"

¶11 Limberg commenced judicial review. The circuit court affirmed the Commission's finding that the accident caused no left shoulder injury.¹ However,

¹ We do not discern Limberg to argue on appeal that the circuit court erred with regard to affirming the Commission with respect to the alleged left shoulder injury. In any event, we conclude that substantial and credible evidence supports the Commission's finding that the January 23, 2004 accident caused no left shoulder injury.

the court reversed the Commission decision regarding the neck injury and awarded temporary disability benefits to Limberg from July 29, 2009 to September 28, 2009. The court also awarded permanent partial disability of twenty percent to his body as a whole, and medical expenses after April 23, 2004 related to injuries caused by his permanent partial disability. The Commission and the County of Jackson now appeal.

¶12 We uphold the Commission’s findings of fact if they are supported by credible and substantial evidence. *Xcel Energy Servs., Inc. v. LIRC*, 2013 WI 64, ¶48, 349 Wis. 2d 234, 833 N.W.2d 665. Credible and substantial evidence is that which is “sufficient to exclude speculation or conjecture.” *Id.* (quoted source omitted). We search the record for evidence supporting the Commission’s factual findings. *Vande Zande v. DIHLR*, 70 Wis. 2d 1086, 1097, 236 N.W.2d 255 (1975).

¶13 The nature and extent of disability caused by an injury is a question of fact. *See id.* at 1095. Similarly, the necessity of treatment for an injury presents a question of fact. *Spencer v. DILHR*, 55 Wis. 2d 525, 530-31, 200 N.W.2d 611 (1972). A court shall not substitute its judgment for that of the Commission as to the weight or credibility of the evidence on any finding of fact. WIS. STAT. § 102.23(6).

¶14 Certainly, there is evidence to support a variety of decisions in this case. Much of that evidence was relied upon by the circuit court in its ruling. However, the question is not whether the circuit court’s view of the evidence is more reasonable than the Commission’s, but whether there is any credible evidence to sustain the findings the Commission did make. We affirm the

Commission's decision because it was supported by substantial and credible evidence.

¶15 The Commission's decision in this case was based primarily upon the medical opinions of Dr. William Klemme. Based upon his physical examination of Limberg and his review of the voluminous medical records, Dr. Klemme found that Limberg had degenerative disc disease and "spondylosis" in the cervical spine. Dr. Klemme also noted that Limberg had neck pain requiring chiropractic evaluation and treatment before the accident.

¶16 Dr. Klemme also personally reviewed the MRI records. He found that the MRI evidence confirmed pre-existing multilevel degenerative disc disease and "spondylosis" in the cervical spine not causally related to the accident. Dr. Klemme observed that between March 2004 and February 2009, "[t]he degenerative changes ... modestly progressed as expected in an age-related fashion over the course of the MRI studies"

¶17 Dr. Klemme determined that the July 29, 2009 cervical fusion "was directed towards a chronic pre-existing degenerative condition at the cervical spine," which had no causal relationship to the January 23, 2004 accident. Dr. Klemme concluded that Limberg sustained a cervical strain/sprain as a result of the accident that reached an end of healing as of April 23, 2004, leaving no residual permanent disability.

¶18 Dr. Klemme's opinions are consistent with Limberg's treatment history, the MRI findings, and the opinions of other physicians, particularly Dr. Wojciehoski who concluded that the accident caused a soft tissue injury with a healing plateau of May 23, 2004, and no permanent disability. Dr. Ihle also concluded that the accident caused a temporary aggravation of a degenerative

underlying neck condition as evidenced by MRI scans. Dr. Ihle concluded that Limberg's condition merely followed a path of normal progression of a degenerative process.

¶19 Limberg's treating physicians reached opinions different from Dr. Klemme's opinions. The ALJ did not credit the opinions of Limberg's treating physicians, and the Commission agreed. The Commission is the sole judge of the weight and credibility of medical evidence. *See Conradt v. Mt. Carmel Sch.*, 197 Wis. 2d 60, 68, 539 N.W.2d 713 (Ct. App. 1995). Contrary to Limberg's approach in his arguments on appeal, a treating physician is not accorded special credibility. *Id.* at 67-70. Where there are inconsistencies or conflicts in the medical testimony, it is for the Commission to decide if one expert's testimony is more persuasive than another's. *See id.* at 69. Dr. Klemme's opinions provided sufficient support for the Commission's decision.

¶20 The Commission weighed the credibility of the various medical opinions in this case, and its decision was not based on conjecture or speculation. The Commission's decision was based upon substantial and credible evidence, and we therefore affirm the Commission's decision.

By the Court.—Judgment reversed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

